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Supreme Court of the United States

OCTOBER TERM, 1966

No. 378

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

—against—

JOSEPH SKIBINSKI,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the District Court is reported in 242 F. Supp. 290. The opinion of the Court of Appeals is officially reported in 360 F.2d 539. Petitioner filed petitions for a rehearing and rehearing in banc on April 13, 1966 which were denied by orders entered April 27, 1966.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28, U.S.C., Section 1254(1).

The Questions Presented

1. Is the use of patently unsuitable equipment which creates a dangerous condition that pre-exists an injury by a substantial period of time within the ambit of the warranty of seaworthiness?

2. Can the unseaworthiness of a vessel be set in motion by the acts of co-workers?

3. Can a shipowner absolve himself of his obligation under the warranty of seaworthiness to provide and maintain a safe place to work by having the traditional work of seamen performed by longshoremen?

4. Have not the courts below by their findings:

(a) that a substantial period of time elapsed during the use of the open mouthed hook fashioned as an apparatus which was patently unsuitable for the use to which it was put resulting in its becoming a part of the ship's equipment, and

(b) the atypical type of operation far from the normal loading and unloading procedure that was being performed,

disposed of petitioner's so-called theory of operational negligence.

Statement of Facts

The following findings of the District Court, *Skibinski* v. *Waterman Steamship Corporation,* 242 F.Supp. 290, S.D.N.Y. 1965, crucial to its decision, were omitted from petitioner's statement of the case:

"A one ton steel ladder struck Joseph Skibinski while he was working in the depths of the hold under Hatch #4 of the S.S. Madaket on November 24, 1958. The injuries which befell him were not the result of an honest mistake in judgment or mere negligence, but rather, as shipowner's counsel conceded and the record overwhelmingly establishes, stupidity—'criminal stupidity' in the use of ship's equipment as put in motion to lower the ladder into the ship's hold for rewelding to the ship's structure (Tr. 36).

* * * *

The job of lowering and rewelding the ladder, furthermore, was not one of the typical, routine and ordinary jobs of every day which take place during unloading of a sugar ship. Indeed, it had happened only once in four years in plaintiff's experience and only 'several times' in the six years Chief Officer Fleming had served aboard the S.S. Madaket (Tr. 83-4, 528-30). The ship was not unaware of the unusual nature of this task; it had given special permission for the removal and its officers were on duty to watch the winches and check to see that the longshoremen did not damage the vessel.

* * * *

* * *. Here, Skibinski, unaware of the 'plan' adopted by his fellow longshoremen on the main deck above, had no way to ascertain or ameliorate from his position in the depths of the hold the dangerous condition created by the use of the open mouth hook to lower the ship's ladder."

The facts as summarized by the Circuit Court, *Skibinski* v. *Waterman Steamship Corporation,* 360 F.2d 539, 2d Cir. 1966, are as follows:

> "Terminal, in order to facilitate the unloading operation, obtained permission to remove temporarily from the cargo hold a one ton steel ladder that was affixed to the ship's structure by welded steel brackets. Skibinski, a welder, was assigned to use his welding equipment to burn off the ladder and brackets. Three days later, the unloading operation having been completed, Skibinski, and a co-worker named Stuve, returned to the vessel to reaffix the ladder, which was lying on the main deck.
>
> Skibinski and Stuve first welded the brackets and then gave the word to lower the ladder. The ladder was to be lowered by three longshoremen, also in the employ of Terminal. Since there was inadequate space to permit the lowering of the ladder at the place it was to be reaffixed the longshoremen devised a plan, which was described as follows:
>
> '(1) lowering the ladder through the open middle section of the hatch; (2) laying it down flat on the bottom of the hold; (3) uncoupling the fastening mechanism by which it was lowered; (4) retrieving the fall; (5) lowering the fall again through the opening between the beams and the aft end of the hatch; (6) recoupling the fastening mechanism; (7) dragging the ladder to the aft end of the hold and lifting it into position.'
>
> Skibinski v. Waterman Steamship Corporation, 242 F. Supp. 290, 294 (S.D.N.Y. 1965).

> In order to lower the ladder through the hatch the longshoremen inserted an open mouth, "S" shaped cargo hook under the top rung of the ladder. Then, with one of the longshoremen operating the winch, the ladder was raised from the deck, positioned over the middle section of the hatch, and lowered. When the foot of the ladder reached the floor of the hold, the ladder disengaged itself from the hook, and rebounded against Skibinski, who, as the district court found, 'was in the wings bending over his tools in preparation for his task.'
>
> The district court held that 'the use of the open mouth cargo hook and the falling ladder were proximate causes of plaintiff's injury.'
>
> * * * *
>
> Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put. The use of this apparatus took a substantial amount of time, so that the apparatus become part of the Madaket's equipment."

The trial court though finding in favor of respondent, plaintiff, on the count based upon the warranty of seaworthiness, held for petitioner on the issue of negligence. Although respondent did not appeal the negligence finding the petitioner's attempt to cloak itself in an aura of blamelessness makes noteworthy the basis for the District Court's opinion. The Court felt constrained to find in favor of the shipowner on the negligence issue in the absence of actual notice in view of the Second Circuit's decision in *Albanese* v. *N.Y. Nederl. Amerik Stoomv. Maats, et al,* 346 F.2d

481; a decision which was in fact reversed by this court on that very point subsequent to the filing of the opinion by the District Court below. See: 86 S.Ct. 429, reversing 2d Circuit.

REASONS WHY PETITION SHOULD BE DENIED.

The decisions of the Courts below, finding the S.S. Madaket unseaworthy, represent a proper application of the law to the facts presented.

The petitioner relies heavily on *Mitchell* v. *Trawler Racer, Inc.,* 362 U.S. 539, 80 S.Ct. 926, citing that portion of the opinion which sets forth a well recognized and undisputed proposition that the owner of a vessel is not required to provide an accident free ship. We are in full accord. A showing of reasonable safety of the S.S. Madaket at the time of respondent's injury would preclude any recovery based upon breach of the warranty of seaworthiness.

The District Court and the Circuit Court below, however, found the use of the open mouth hook to lower the one ton, twenty-five foot ladder into the hold created a condition fraught with danger of criminal proportions which preceded the injury to plaintiff by a substantial period of time so that the apparatus became part of the Madaket's equipment.

The *Mitchell* case, supra, made crystal clear the non-delegable duty, divorced from any negligence concepts of liability based upon fault, of a shipowner to provide a seaworthy vessel and in addition "disposed of the suggestion that liability for a temporary un-

seaworthy condition is different from the liability that attaches when the condition is permanent." Citing *Alaska Steamship Co.* v. *Petterson,* 347 U.S. 396, 74 S.Ct. 601 and *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S.Ct. 872, which extended to stevedoring company employees performing traditional seaman's work aboard ship, the same protection against unseaworthiness which members of the ship's crew enjoy.

In *Petterson,* supra, the ship was rendered unseaworthy by defective equipment brought on board by the stevedore. Is there any logical distinction for imposing liability for injuries resulting from defective equipment provided by a stevedore and used aboard ship after the shipowner has relinquished his control of the loading operation (*Petterson* v. *Alaska,* supra) and the imposition of liability in the instant case where the longshoremen, co-workers of respondent, devised a criminally stupid plan and fashioned a patently unsuitable piece of rigging which created a dangerous condition that preceded respondent's injury for a period of time, found long enough by the courts below, to make the rigging a part of the ship's equipment.

The presence of sound equipment on board the S.S. Madaket and the fact that the unseaworthiness was set in motion by respondent's co-worker is not enough to excuse the shipowner.

Mahnich v. *Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455;

Crumady v. *The J. H. Fisser,* 358 U.S. 423, 79 S.Ct. 445;

Thompson v. *Calmar,* 3d Cir., 1964, 331 F.2d 657, Cert. denied 1964, 379 U.S. 913;
Strika v. *Netherlands Ministry of Traffic,* 2d Cir., 1950, 185 F.2d 555, Cert. denied 1951, 341 U.S. 904.

In *Morales* v. *City of Galveston, Texas,* 370 U.S. 166, 82 S.Ct. 1226 (1962), this Court again reiterated that unseaworthiness can arise from a multiplicity of factors when, at page 170 of 370 U.S., it stated:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. (Cases cited). For any or all of these reasons, or others, a vessel might not be reasonably fit for her intended service."

That gear which is neither defective nor broken can, if put to an improper use, render a vessel unseaworthy was reaffirmed by this court by its approving citation of *Strika* v. *Netherlands Ministry of Traffic,* supra, in *Gutierrez* v. *Waterman S.S. Corp.,* 373 U.S. 206, 214, 83 S. Ct. 1185, 1190.

Petitioner's restrictive interpretation of broad, policy based decisions of this court fails to take into account the increasing spectrum of the warranty of seaworthiness since *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872, was decided in 1946.

Decisions in the Circuit Courts are in accord in recognizing the broad coverage of the warranty of seaworthiness.

Thompson v. *Calmar Steamship Corp.*, supra;
Ferrante v. *Swedish American Lines,* 331 F. 2d 571 (3d Cir.), Cert. dismissed 1964;
Knox v. *U.S.,* 320 F. 2d 247 (3d Cir. 1963);
Scott v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964);
Blassingill v. *Waterman S.S. Corp.,* 336 F. 2d 367 (9th Cir. 1964);
Radovich v. *Cunard S.S. Co., Ltd.,* 2d Cir., decided July 18, 1966, Docket No. 29867;
Reid v. *Quebec Paper Co., Ltd.,* 340 F. 2d 34 (2d Cir. 1965);
Norfleet v. *Isthmian Lines, Inc.,* 355 F. 2d 359 (2d Cir. 1966);
Grillea v. *United States,* 232 F. 2d 919 (2d Cir. 1956);
Strika v. *Netherlands Ministry of Traffic,* supra.

There are cases, notably in the Second Circuit, holding that a dangerous condition created by longshoremen in the normal and usual course of a loading or unloading operation which has not yet ripened into unseaworthiness will not cast the shipowner in liability. Even if this Court were disposed to recognize the concept of "operational negligence", the findings of the courts below that this was not an incident in the usual or typical course of a loading or unloading process and that the unsafe condition had been in existence for a substantial period of time (see *Grillea* v. *United States,* supra) belie its application to the instant situation.

We are here faced with a circumstance where a defendant wishes this Honorable Court to reverse both the District and Circuit Courts below by apply-

ing the theory of "operational negligence", a concept which has never been the recipient of Supreme Court approval, in spite of findings by both courts below that the doctrine was inapplicable to the facts presented.

The petitioner claims there are unique, important and unsettled questions of law presented which require a determination by this tribunal. There have been numerous other requests for certiorari by both longshoremen and shipowners where a longshoreman was injured as a result of the improper use of equipment by his co-workers. This Court, however, has left to the trier of the facts the question of when a particular set of circumstances results in a vessel being rendered unseaworthy.

Thompson v. *Calmar,* supra;
Massa v. *C.A. Venezuelan Navigacian,* 332 F. 2d 779, 2d Cir. 1964, Cert. denied, 379 U.S. 914;
Pudda v. *Royal Netherlands Steamship Company,* 303 F. 2d 752, 2d Cir. 1962, Cert. denied, 371 U.S. 841;
Strika v. *Netherlands Ministry of Traffic,* 185 F. 2d 555, 2d Cir. 1950, Cert. denied, 341 U.S. 904.

CONCLUSION

Upon the foregoing considerations the petition for writ of certiorari should be denied.

Respectfully submitted

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